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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH and IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS, C. J. D. RUDOLPH AND IRMA M. RUDOLPH

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.

WARLICK LAW INC — 2263 VALDINA STREET — DALLAS — ME 1-3130

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I.

INTRODUCTION: THE ISSUES CLARIFIED

Respondent seeks to avoid a head-on clash about the statutory concepts of gross income and "ordinary and necessary" business expenses by purporting to concede, at least in part, the validity of the legal propositions espoused in Petitioners' brief. By assuming that all is sweet accord

between the litigants as to the governing legal standards (a rather surprising admission in a context heretofore unexplored by the courts), he neatly reduces the question to whether or not the fact findings of the District Court should be set aside as being "clearly erroneous." We disagree on both scores! We disagree that there are no legal principles for the Court to enunciate. And we would disagree that the only issue is whether or not the fact findings of the District Court are "clearly erroneous", even if we were to accept the assumption that Respondent confirms Petitioners' exposition of the law and the Court should agree with both of us.

It is not stretching a point to say that Respondent, over the years, has strenuously resisted recurrent efforts to narrow, even slightly, the scope of statutory "gross income". At every turn, Respondent has sought to prevent any enlargement of the exceptions to gross income other than those specifically created by statute and, perhaps, by Respondent's own policy decisions. The lesson of this history is pertinent to reading, in their proper perspective, the arguments made in Respondent's brief.

Petitioners recognize full-well the broad reach ascribed to the concept of gross income by this Court. We do not refute the rationale of *Glenshaw Glass*,[1] *Comm'r v. Smith*,[2] and the like, either directly or implicitly; to the contrary, we rely upon those cases as intrinsically embodying the principle that not every gain realized by an employee in an eco-

[1]Comm'r v. Glenshaw Glass Co., 348 U. S. 426, 99 L. Ed. 483, 75 S. Ct. 473 (1955).

[2]Comm'r v. Smith, 324 U. S. 177 (1945).

nomic or psychic sense constitutes gross income. We believe this principle has been recognized in such areas as meals and lodging, certain so-called fringe benefits, and others, but there is little else in the written law which elaborates upon the idea or preciseiy defines its constitution. Obviously, we do not contend that compensation, in whatever form paid, can escape the net of gross income, for this Court has said that it cannot. But we do contend that an employee does not realize taxable income where he is the recipient of some benefit (i) which the employer *did not intend* as additional compensatiton; (ii) there is no undeniable accession to wealth, clearly realized, over which the employee has complete dominion; and (iii) the dominant motive of the employer is to further his business and the thing provided bears a reasonable relationship to that end.

Respondent apparently now agrees with this expression of a non-statutory exception to gross income, and for this we are grateful. However, it is clear that the District Court did not have the benefit of any judicial or administrative pronouncement about the concepts here discussed in the light of which it was to find the facts, and the present ex post facto concession of Respondent affords scant comfort in this regard.

The picture is quite similar on the deduction side of the case. This Court has periodically declared certain fundamental standards which have shaped and molded subsequent determinations as to whether or not expenditures made in the course of a taxpayer's activities constituted "ordinary

and necessary" expenses of doing business.[1] Each case must still be decided on the basis of its peculiar facts and circumstances, but it is apparent that the outcome of each case and the predisposition in which the trier of facts approached his job was affected, sometimes immeasurably, by the broad legal principles laid down by the Court.

The instant case[2] appears to represent the first time that the courts have been called upon to apply the "ordinary and necessary" standard of the statute to expenses incurred by an employee in attending, at the behest of his employer, a convention of similarly situated employees of that employer. What legal significance is to be given to the fact that the employees of a single business concern are gathered together for a purpose, deemed to be a legitimate business purpose, by their employer? Should there not be some legal standard which explains the force and effect to be accorded an employer's demand that an employee participate in a company-planned meeting which the employer believes is related to the business of both the employer and employee? Is the standard to be influenced by whether or not the particular function involved is one accepted in the industry as serving

[1] See, *e.g.*, Welch v. Helvering, 290 U. S. 111, 54 S. Ct. 8 (1933) ("ordinary" expenses are not necessarily habitual or normal expenses in the sense that the same taxpayer will have to make them often. An expense will usually be considered "necessary" if the expenditure is appropriate and helpful in developing and maintaining the taxpayer's business, so the necessity involved in the determination need not be absolute or inexorable); Deputy v. DuPont, 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 416 (1940) (it is sufficient if the expense is a common or frequent occurrence in the type of business in which it was incurred); Kornhauser v. United States, 276 U. S. 145 (1927) (the expense must bear a "direct and proximate" relationship to the taxpayer's trade or business); Lilly v. Comm'r, 343 U. S. 90, 72 S. Ct. 497, 96 L. Ed. 769 (1952) (customs of organized professional groups are appropriate in determining whether particular expenditures are "ordinary and necessary").

[2] Along with Patterson v. Thomas, 289 F. 2d 208 (5th Cir. 1961).

defined business purposes? Does a business convention have to be all business? These are not isolated questions appearing here never to be seen again. These are questions which stick out this day and every day in our business community, and with respect to which there is an august need for legal guidance.

Certainly, we stated in our original brief, and affirm now, that the ultimate question with respect to the deduction of expenses is whether or not Petitioners attended the convention primarily for reasons of business or personal pleasure. But how is this question to be answered? In the abstract? This question and the answer thereto have no relevance in the scheme of things except as they relate to whether or not Petitioners' expenditures were an "ordinary and necessary" expense of doing business within the meaning of the statute. The term "ordinary and necessary" has no genetic or natural meaning in the conduct of our affairs, but must be given form and substance in its application under the tax laws. The Court has offered valuable guides in this application, and now it is respectfully requested to refine those guides.

What we are trying to get across is this: The legal concepts involved in a tax controversy both precede and follow the fact determination. The legal concepts set the stage for the fact inquiry and then operate upon the facts once found as the consequences under the law. Where the legal concepts are missing or ill-defined (particularly where they are general or far-reaching, as in the instant case) the fact inquiry may be inadequate in failing to search out particular facts

having legal significance, it may be based upon an erroneous assumption as to the law (which, unless expressed fortuitously in the opinion, only the trier of the facts would know), or it may permit the personal predilections of the trier of the facts to play a more dominant role than that to which they should properly be relegated. There are, at best, shifting and elusive (and, sometimes, illusory) distinctions between "evidentiary facts", "inferences", or "ultimate facts", and matters of "law", and this trichotomy may depend largely upon the attitude with which the case is approached by the trial tribunal and the clarity of the law with which he must deal. The "findings of fact" in this case might have been quite different had Petitioners' view of the law been accepted and known as precedent!

Therefore, our position before the Court in this case is as follows:

1. There *are* questions of law regarding the concepts of "gross income" and "ordinary and necessary" business expenses which the Court should decide.

2. We believe that the analysis and resolution of these questions of law are correctly presented in the brief for Petitioners.

3. The Court has recognized that an exception to the reasons for restraint on appellate review may exist where

See Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899 (1943); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 59 Harv. L. Rev. 753 (1944); Rice, *Law, Fact and Taxes: Review of Tax Court Decisions Under Section 1141 of the Internal Revenue Code*, 51 Colum. L. Rev. 439 (1951).

principles of general application are involved.[6] Here, the principles involved are not only of enormous scope but they touch on aspects of everyday business practice which have never before been analyzed by the courts in relation to the tax laws. Accordingly, we submit that the Court should exercise review without limitation by the "clearly erroneous" rule, and should decide the case on its own.

4. Perhaps as a corollary to the immediately preceding statement, we believe that the trier of the facts based his findings on an erroneous understanding of the law. For instance, the District Court held that its actions were not governed by the "purpose of the insurance company in holding them [the convention]", yet this would seem to be the single most important determination in the case. Again, on established precedent,[7] the scope of review should not be bound by the "clearly erroneous" rule.

5. Only if the Court rejects the foregoing do we come to the question of whether or not the fact findings of the District Court are "clearly erroneous". In such event, it is our position that the findings of fact *are* "clearly erroneous", based upon the record as a whole.

6. Finally, and alternatively, we contend that the findings of fact do not satisfy the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

Having broadly stated our position, we shall now answer in kind a few key points made in Respondent's brief.

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[6] Rice, *supra* n. 5, at p. 453.

[7] Helvering v. American Dental Company, 318 U. S. 322, 87 L. Ed. 785 (1942); Comm'r v. Brown Shoe Company, 175 F. 305 (8th Cir. 1949); 5 MOORES, FEDERAL PRACTICE § 52.03 at p. 2631; 14 CYCLOPEDIA OF FEDERAL PROCEDURE § 67.32 at p. 227 (3d Ed. 1952).

II.

ON THE CONCEPT OF GROSS INCOME

Respondent takes a cart-before-the-horse approach and suggests that the Court decide the deduction issue first, because if the Court should find that a deduction is proper "there would be no need to reach the gross income question since Petitioner would in any event be entitled to an offsetting deduction" (R. Br. 36). This is circuitous reasoning which leads nowhere. Even if the Court does nothing more than allow Petitioners a deduction, it is by implication holding that the value of the convention trip is includible in their income; unless such value is first run through the tax mill and the expenditures thereby attributed to Petitioners, there can be no basis for a deduction. Moreover, the question is not "teasing but unimportant", for in the case of employees the employer will be faced with the difficult burden of withholding,* regardless of whether or not the employee is permitted an offsetting deduction.

Therefore, with the horse once again back where it belongs, we can continue.

Respondent obviously misunderstands our analysis of the gross income concept. He indicates that we would exclude the value of the convention trip from Petitioners' gross income on the ground that "it can be realized only by being consumed and therefore has not *transferable* value" (R. Br. 37), but, he further suggests, we eventually see the error

*Sections 3401 (a), and 3402, Internal Revenue Code of 1954; Reg. 31.3401(a)1(b)(10). Cf. Hallmark Cards, Inc. v. United States, 62-1 U.S.T.C. 9162 (W.D. Mo. 1961).

of our own way and in the end add the proviso "if not intended as compensation" (R. Br. 46).

Let us set the record straight. We did not in our original brief, nor do we now, contend that the nature of the thing received *a fortiori* may determine whether or not it constitutes gross income. If an employer confers a benefit upon an employee primarily as compensation, the employee realizes income whether the benefit is consumable, edible or otherwise, unless it fits within some statutory exception. This Court has said so,[9] and we make no pretense of going counter to that principle. But in the absence of intent to compensate, the nature of the thing received—whether in kind or cash—is one of a combination of factors which may be influential in deciding whether or not it comes within the ambit of gross income.

For instance, if an employee receives money from his employer which he is obligated to expend in a prescribed manner for prescribed purposes, the receipt of those funds does not constitute income to him. This conclusion is justified by the conduit or agency theory,[10] which, perhaps, is the converse or corollary of the "claim of right" doctrine. Thus, assuming that in this case there was no intention to compensate, if the Company made all arrangements for the convention (as it did) and merely gave Petitioners cash to pay the bills applicable to them, the receipt and disbursement

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[9]Comm'r v. Smith, 324 U. S. 177 (1945).

[10]The Seven-Up Co., 14 T.C. 965 (1950) (receipt of funds to be expended on behalf of another not income to the recipient); Broadcast Measurement Bureau, Inc., 16 T.C. 988 (1951) (same); Rev. Rul. 56-152, 1956-1 Cum. Bull. 58 (brokerage commissions not income where impressed with a public trust and deposited in special fund for public purposes). See also 2 MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 17.11, 17.12 (1961).

of that cash should not constitute income to Petitioners because they were only acting as agents to discharge the obligations of the company. The dominion and control over the funds continued to rest in the Company, because they directed how it was to be spent.

On the other hand, if an employee receives money from his employer to be expended upon himself in the pursuit of his employer's business, but he is given wide discretion as to how and when the money shall be spent, his dominion and control over the receipt may be sufficient to warrant its inclusion in gross income in the first instance, even though he is allowed an offsetting business expense deduction. Even here there is grave doubt about inclusion of the receipt in income, since the courts and Respondent have recognized that reimbursement of expenses incurred on behalf of another is not income to the recipient, probably on the theory that the reimbursement represents repayment of a loan.[11]

Finally, if an employee receives something in kind, which is intended to further the business of the employer and bears a reasonable relationship to that end, the circumstances are most analogous to receipt of money which must be expended in a prescribed manner and for prescribed purposes on behalf of the employer—the "in kind" counterpart of the agency concept. In other words, where an employer gives an employee something in kind to be used in

[11] Robert L. Gray, 10 T.C. 590 (1948) (reimbursement of expenses not income); Julien A. Martin, 1952 P-H T.C.M., dec. 52,282 (same); I.T. 4068, 1952-1 Cum. Bull. 7 (fees from child placement agency to foster parents for costs of maintenance not includible in income); Rev. Rul. 60-280, 1960-2 Cum. Bull. 12 (reimbursement to parents by school board for costs of transporting children where bus service not available held not income). See also Rev. Rul. 60-279, 1960-2 Cum. Bull. 11.

or for purposes of the employer's business, the employer has effectively retained dominion or control over the thing and directed its use; accordingly, there is no justification for including the value of the thing in the employee's income. This is the importance of the nature of the thing received, and none other. Therefore, Respondent's "exposure" (R. Br. 8-9, 46-48) of the error in our alleged theory of benefits which can be realized only through consumption, is simply not in point, because that was not the point we endeavored to present.

Furthermore, we do not refute the significance of *Glenshaw Glass, Comm'r v. Smith*, or the other important decisions cited in both Petitioners' and Respondent's briefs. As stated previously, we rely upon those cases as recognizing intrinsically that not every gain realized by an employee in an economic or psychic sense constitutes gross income, and that there are exceptions to gross income other than those specifically enumerated in the statute. We are not asking the Court to restrict in any manner the scope of those cases, nor are we soliciting a reversion to the "nature of income" approach of *Eisner v. Macomber*.[12] But we do urge the Court to recognize an area beyond the peripheries of those cases wherein, under limited and proper circumstances, an employee may receive a benefit from his employer yet not be in receipt of taxable income. In appreciation of the fact that non-statutory exceptions to gross income should be acknowledged parsimoniously, and only after exhaustive consideration, we have attempted to spell out meticulously the circumstances which should be present if there is to be

[12] 252 U.S. 189, 64 L. Ed. 521, 40 S. Ct. 189 (1920).

an exception: (i) the employer did not intend the benefit conferred to be additional compensation to the employee; (ii) there is no undeniable assession to the employee's wealth, clearly realized, over which he has complete dominion; and (iii) the dominant motive of the employer is to further his business and the thing provided bears a reasonable relationship to that end.

If the Court accepts the foregoing as a correct interpretation of the law, then it is agreed that the taxability of the convention trip to Petitioners turns on whether or not the first test is satisfied—whether or not the Company intended the trip as additional compenstaion to Petitioners. Even so, the issue is not simply whether the facts found by the District Court are clearly erroneous; rather, for the reasons stated hereinbefore it is an issue which the Court should decide.

III.

WITH RESPECT TO CONVENTIONS AND "ORDINARY AND NECESSARY" BUSINESS EXPENSES

Although the same basic facts that lend support to an exclusion from income also, when turned around, confirm the presence of legitimate business expenses, it is important, at the outset, to perceive a distinction between the two. The issues of income and expense are not mirror reflections of each other. The "income" side of the case is essentially one of demonstrating reasonable justification under the law for excluding something from the broad concept of gross income.

The expense side of the case, however, is concerned less with esoteric concepts and more with the pragmatic and reasonable business judgment of reasonable businessmen. Therefore, upon exactly the same facts, a benefit conferred by an employer upon an employee might be caught in the web of gross income and nevertheless constitute an imputed business expense of the employee.

Respondent has directed a two-pronged attack against our argument that the expenditures here involved, if imputed to Petitioners, would constitute "ordinary and necessary" expenses of doing business. We shall address ourselves to that attack.

1. Initially, Respondent urges that the compulsion upon Petitioners to attend the convention is meaningless except as evidence of "the employer's reasons for wanting the act done."[1] He undertakes to emphasize his point by indulging in what has been eloquently called the "parade of horribles," whereby the consequences of a decision are strung out in seemingly logical sequence until the end result is undesirable —and absurd. We do not suggest that a taxpayer be permitted to deduct the cost of food or shelter merely because his employer ordered him to do so in recognition of the fact that one must eat and sleep to work (R. Br. 31). But we do suggest that it is legally significant when an employer requires an employee to participate in an activity planned by the

[1] This underscores another fallacy in Respondent's argument that the convention trip was intended as compensation to Petitioners. It is rather unusual, we would think, that an employer would force compensation upon an employee by making receipt of that compensation compulsory. The fact that Petitioners were required to take the convention trip indicates that "compensation" was not what the Company—nor Petitioners—intended.

employer, and accepted by virtually all members of a nation-wide industry, as a vital facet of and aid to the business of both the employer and employee.

Respondent apparently would concede that Petitioners' imputed expenditures in attending the convention were "necessary" within the meaning of section 162, since they were required to attend by the Company. However, his brief also points out (R. Br. 32), and properly so, that to be deductible an expenditure must not only be "necessary" it must also be "ordinary". We likewise agree that the expense must bear a "direct and proximate" relationship to the business of Petitioner, but, at this juncture, we part company.

Respondent states that our "recitation of the numerous kinds of conventions for which deductions have been allowed proves nothing (R. Br. 25)". What it does prove is very important to this case: that conventions are an "ordinary" (and, indeed, a common-place) part of our business life, and that expenditures incurred by taxpayers in attending conventions have long been deductible as "ordinary and necessary" expenses of doing business. We dare say that the convention involved herein was not dissimilar in make-up to any of the conventions in the cited cases, except for the fact that the convention was Company-sponsored for its employees. This latter fact would seem to make the convention more "ordinary" in Petitioner's business, not less so.

As for the "direct and proximate" relationship between the expenditure and the taxpayer's business, how could the relationship be considered otherwise when the convention was sponsored by Petitioner's employer, his fellow agents and

officers of the company were the participants, the theme of the convention was the business of selling insurance, and all activities at the convention, including group travel to and from the convention site, were designed to encourage the free interchange of ideas between the agents and the officers.

Finally, on top of the usual business reasons for attending conventions (which were recognized by the cited cases), we believe that legal significance should be attributed to the fact that Petitioner's employer required him and his wife to attend. Does not this fact give Petitioners a business reason and purpose to participate in the convention over and above the independent business benefits which he derives from such participation? We are not talking here about a fictitious demand by an employer that an employee do something traditionally considered personal, such as eat, dress well, etc.; we are talking about a demand by an employer that an employee do something traditionally considered businesslike. When the employee reacts in the only sensible way he can, he is reacting—and acting—for business reasons.

2. Respondent states that " 'shop talk' is a part, not of the business, but of the life, of the professional man." The question is asked, then, whether "shop talk" is enough to convert an otherwise social event into a business one. Indeed, it is not. If a group of lawyers and their wives gather for a social dinner, the occasion does not turn into a business event because the lawyers huddle in one corner of the room to talk

about the law. By the same token, merely because a planned gathering of members of a profession is not regimented with formal meetings, does not turn this business event into a social one. The "shop talk" at a professional convention is a manifest part of the business of the convention, and is as important to the success thereof as the formal meetings. In the circumstances of a convention, "shop talk" is not a mere incident to a social event in one's life; it is an integral part of the business event itself. Can it be said that informal discussion at a Bar Association convention—or any professional convention—"does not bear to the business [of the professional man] the *kind* of relationship that is implied by 'ordinary and necessary' (R. Br. 35)"?

Respondent suggests that "shop talk" should be recognized as a business activity "only when it is formally organized and channelled, as at formal meetings, round-table discussions, conferences, training sessions and the like." The officers of the Company testified that the informal association and discussion among the agents and officials was an important part of the convention program, and that the activities and group travel were planned with this in mind. Must "shop talk" be pursued in an auditorium to constitute a business activity, or can "shop talk" be formally organized on an informal basis? We think the latter is more effective and better serves the business purpose for which such discussion is intended.

IV.

WIVES, CONVENTIONS, AND BUSINESS EXPENSES

We submit that if Petitioner, C. J. D. Rudolph, is deemed to have incurred expenses in taking his wife to the convention, those expenses are deductible as "ordinary and necessary" business expenses for essentially the same reasons that his own expenses are deductible. Respondent offers to refute this by again utilizing the "parade of horribles" type of argument. We do not think that the cost of supporting a wife at home is deductible simply because an employer will hire or retain in his employ only married men (R. Br. 55).

On the other hand, if a major corporation, in the exercise of its business judgment, establishes a policy of interviewing the wives of prospective employees, of continuously soliciting the wives' good will and support through letters and publications, and of addressing a portion of its convention program to the wives, we believe that there does exist a direct kind of relationship between an agent's business and his wife's presence at the convention. Under such circumstances, a wife's expenses to attend the convention should be deductible even if incurred voluntarily. Where the wife's presence is a "command performance", and the agent acts in deference to his employer's decision and business judgment, we think the relationship between business and expense is unequivocal.

Wives are, after all, a fact of life. If this is recognized by an employer, as well as by the husband, and an earnest and

formal effort is made by both to encourage the wife's understanding of her spouse's job and the company for which he works, we think the project is sound business and the money well spent.

V.

ANALYSIS OF THE "FACT FINDINGS"

1. Considering the record as a whole, we believe that the "facts" found by the District Court are clearly erroneous. However, before getting down to the facts, we wish to reiterate our contention that in exercising its power of review the Court is not limited to determining whether the findings are "clearly erroneous". The instant case involves definitional refinements of the concepts of "gross income" and "ordinary and necessary" business expense about which neither this Court nor any other court (except the lower courts herein) has previously spoken. In the absence of guiding legal principles on such pervasive matters, the responsibility of the trial tribunal must of necessity be narrowly confined and, we submit, this Court should exercise its broadest powers of review.

2. Furthermore, we believe that the "findings of fact" by the District Court were predicated upon an erroneous assumption as to the governing law. The opinion of the court stated (R. 79): "It is the purpose of the convention to the taxpayers which governs our action, *not the purpose of the insurance company in holding them* (emphasis supplied)." Even Respondent assuming the validity of the

remainder of our legal proposition, states that the income question turns on the reasons why the Company sponsored the convention and paid Petitioners' expenses. In other words, the purpose of the Company "in holding them" is of the utmost importance—if not the controlling factor—in determining whether the convention trip constitutes income to Petitioners. Yet the trier of the facts admittedly ignored that inquiry. On the expense question, the purpose of the Company in sponsoring the convention is of like importance. Again, that determination was ignored. Moreover, the court apparently was of the opinion that the convention had to be "purely educational" in order for it to qualify as a business meeting.

The failure of the trial tribunal to inquire into and accord due weight to the purpose of the Company in sponsoring the convention establishes that the "fact findings" were based upon an error of law, and, as we shall demonstrate hereinafter, inexorably led to the "fact findings" being clearly erroneous. Findings of fact based upon an error of law are not protected by the "clearly erroneous" rule.

3. Because the opinion does not clearly review the facts, but merely draws inferences therefrom, it is not feasible to isolate the specific fact findings which are clearly erroneous, although at least two analogies which the court used to illustrate its conclusion are based upon "clearly erroneous"

factual premises." From the record and the opinion as a whole, however, it is apparent that the scope of inquiry was limited to the objective or extrinsic aspects of the convention —such as the location of the convention site, its distance from the Company's home office, and the fact that Petitioners' received a presumed benefit in the form of the convention trip (the same, the court hypothesizes, as if they had received an automobile). The court's limited inquiry is a natural outgrowth of his rejecting the Company's purpose in sponsoring the convention as being of any relevance. Based upon extrinsic appearances only, the court concluded that the convention trip was in the nature of a bonus or reward.

The conclusion of the court is particularly weak in that it is contrary to the very testimony—uncontroverted testimony —which the court chose to ignore as being irrelevant: that the purpose of the Company in sponsoring the convention was not to give a bonus or award to Petitioners; that its purpose was to build esprit de corps, instruct the agents, and encour-

"The fourth paragraph of the opinion beginning on page 80 of the Record not only appears to represent some generalized conclusions of law about the purpose of conventions, but also suggests that the agent, to enjoy the trip, "would have paid out * * * his own funds if the company had not given it to him. * * *" Rudolph testified (R. 43) that he would not have gone had he been required to pay his own way. He also testified that "Whenever I take a trip I like to get away from it all, not have any schedule, and do as I please (R. 43)."

The fifth paragraph on page 80 of the Record describes, by supposed analogy, a situation where an insurance agent is given a choice of a trip to Paris, France, or a $500 bonus if he sells a specified amount of insurance. The analogy is inapposite to the facts before the court. Had Petitioners been unable for any reason to attend the convention, they would have received nothing in lieu thereof (R. 32, 54). Furthermore, the implication that Petitioners received the convention trip as an award for selling so much life insurance is also contrary to the evidence. Certain minimum production standards were established by the Company as a guide for selecting the agents who should attend the convention (R. 61), but the convention was not, nor intended to be, a quid pro quo for services rendered. Even though an agent qualified to attend, he still had to be invited by the Company (R. 49), and there was no distinction between agents meeting the minimum standard even though their sales of insurance may have varied greatly.

age the exchange of ideas about the sale of life insurance. Mr. J. Harry Wood, a qualified expert in the management of insurance companies and then Managing Director of the Life Insurance Management Association, testified (R. 64-72) that conventions of the type here involved were held almost universally by members of the life insurance industry since 1924, as a part of an agency development program and for the sound business purposes of motivating the agents, building the company "image", and stimulating the exchange of ideas.[14]

It would not seem proper or correct for the trial tribunal to draw inferences dispositive of the case from undisputed evidentiary facts (the extrinsic aspects or appearances of the convention), where the inferences so drawn are unequivocally contrary to uncontroverted oral testimony before the court.[15]

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[14] Mr. Wood testified (R. 66):

"Q. Is it traditional in the life insurance agency to hold this type of convention as part of the agency development program of the company?

"A. Yes; too, I say it is more than that but companies usually think of holding them to educate—but I mean education in a little bit different way than normal, to motivate, to build loyalty; but to my mind, one of the chief reasons for a general convention is to rekindle and reeducate the man to the life insurance business because this is sort of a lonely business in the sense you probably get more turn-downs to sales than in many others, and so, when agents meet other successful agents from over the country and find out they have the same problems, I think much is accomplished by that meeting.

"Q. Is anything accomplished toward acquiring and maintaining loyalty to the company at the convention?

"A. Yes, it is, but the loyalty comes about from two or three ways. First you form a loyalty by learning and knowing the company is strong and the company is strong in part by reaction toward management; and, secondly, because your loyalty to any organization is partly loyalty to individuals and as you get to meet individuals of that company from all over the country, that builds a friendship which in turn makes for loyalty."

[15] See, *e.g.*, J. H. Robinson Truck Lines, Inc. v. Comm'r, 183 F. 2d 739 (5th Cir. 1950); Wright-Bernet, Inc. v. Comm'r, 172 F. 2d 343 (6th Cir. 1949); Mayson Mfg. Co. v. Comm'r, 178 F. 2d 115 (6th Cir. 1949); Kent v. Comm'r, 170 F. 2d 131 (6th Cir. 1948); Hartz v. Comm'r, 170 F. 2d 313 (8th Cir. 1948).

Decisions would be simple if everything was cast in terms of black and white, as the villain and the hero in the silent films. Obviously, the convention trip was intended to be a pleasant experience for the participants, and no doubt it was so. It would be simple enough, therefore, to look only at the social aspects or outward appearances of the convention and conclude that it was in the nature of a bonus to the fortunate recipients. *But on all the facts before the court*, it is quite apparent that the purpose of the Company in sponsoring the convention was rooted in business reasons much more complex and important than simply paying its agents a bonus.[17] After all, why did the Company go to the time, effort and added expense in planning a convention of this scale if its objective was simply to pay a bonus? Why require the agents

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[17] Respondent refutes our suggestion that trial counsel for the Government did not question the bona fides of the convention (R. Br. 18, n. 6). However, Mr. J. Harry Wood, Managing Director of the Life Insurance Agency Management Association, was in the process of testifying about the business purposes which insurance companies have for holding conventions of the type involved herein. Mr. Vaseliades, counsel for the Government, objected on the ground that the witness could not testify to the purpose of a convention without having been there. Apparently because of Mr. Wood's expertise in this field, the Court permitted him to state "the advantages that accrue to the company by reason of holding them [the conventions]." Mr. Vaseliades then stated (R. 67):

> "One further reason for my objection is, as I stated before, we are not challenging the bona fides of this *production* (emphasis supplied) to the insurance company; that is not an issue and any evidence on that matter is irrelevant to our issue. That is all he has given us here today."

Respondent would cast this admission aside on the grounds that (R. Br. 18, n. 6):

> "The word 'production' seems an obvious mistranscription of 'deduction', and it is true that we have never challenged the deductibility of the costs of the convention to the Company."

However, expenses of the type here in issue generally were not deductible by life insurance companies in 1956, which Respondent acknowledged in his brief before the United States Court of Appeals for the Fifth Circuit. See section 803, Internal Revenue Code of 1954. Counsel for Petitioners were present at the trial, and Government counsel did, we believe, use the word "production", obviously referring to the convention.

and officers of the Company to travel together? Why require that the agents attend at all? The answers to these questions are reflected in the uncontroverted testimony before the court, and they demonstrate business motives which could not be fulfilled by offering the agents the inducement of, and actually paying, added compensation.

Similarly, the District Court found that the "trip was primarily a pleasure trip in the nature of a vacation", and this is apparently all he found with respect to the reasons why Petitioners attended the convention. The original error of the court in disregarding the business purpose of the Company in sponsoring the convention is thus compounded. If the trip was intended as a bonus, it is quite reasonable to assume, from the standpoint of the recipient, that the trip was accepted primarily for reasons of pleasure. On the other hand, if one does not ignore the uncontroverted testimony that the Company sponsored the convention for business purposes unrelated to the harvest it might hope to reap by paying its employees a bonus, the reasons why Petitioners attended appear quite different. One does not take a vacation when one is compelled to attend a business meeting. An officer of the Company testified that Rudolph was expected to attend the convention as part of his responsibilities as an agent (R. 61, 74), and that he would have been called upon to present a valid reason had he been unable to attend (R. 54). Rudolph likewise testified that he was required to attend (R. 28). Furthermore, if the primary purpose of the convention was business, the relationship between the convention and Rudolph's own business seems beyond dispute.

Therefore, considering the record and opinion as a whole, it is our conviction that the "findings of fact" are "clearly erroneous" and should be set aside.

CONCLUSION

In conclusion, we believe that Respondent's brief has obscured the issues which we feel are so important for the Court to decide, and we have endeavored to bring them once again into clear focus. We urge the Court to take this opportunity to up-date their expression of the law, so that the practical business purposes which make the company convention a common-place part of the American scene will be accorded proper recognition in the application of the tax laws.

For the reasons here stated and in our main brief, it is submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.